No. 22,447

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. J. BUMB, TRUSTEE OF THE ESTATES OF
WM. H. MECOM and ZETTYE M. MECOM,

Appellant

v.

UNITED STATES OF AMERICA, INTERNAL
REVENUE SERVICE,

Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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OPINION BELOW

The District Court wrote no opinion. Its order affirming the order of referee (I-R. 81-82) is not officially reported.

JURISDICTION

This is an appeal by the trustee in bankruptcy from an order of the District Court overruling the trustee's objections to amended claims for income taxes filed by the District Director. William Howard Mecom and his wife filed voluntary petitions in

bankruptcy on September 10, 1964. (I-R. 2-28.) Pursuant to Section 22 of the Bankruptcy Act, as amended, the proceeding was referred to a referee in bankruptcy. (I-R. 2.) The first meeting of creditors was held on October 12, 1964. (I-R. 29.)

Within the six months' period for filing proofs of claim set forth in Section 57n of the Bankruptcy Act, as amended, the Internal Revenue Service filed, on April 12, 1965, a proof of claim for taxes in the amount of $6,838.41 (I-R. 56); it filed an amended proof of claim on January 24, 1966, in the amount of $6,292.82 (I-R. 57), and a supplemental proof of claim on December 22, 1966, for $46,578 (I-R. 58). On March 9, 1967, it filed a proof of claim amending and consolidating its prior proofs of claim in the amount of $53,362.39. (I-R. 62.)

On January 17, 1967, the trustee in bankruptcy filed an objection to the Service's proof of claim dated December 22, 1966. (I-R. 61.) The referee overruled the trustee's objections. (I-R. 70.) Within the period allowed by Section 39c of the Bankruptcy Act, as amended, the trustee filed a timely petition for review on July 27, 1967. (I-R. 72-73.) Pursuant to jurisdiction conferred upon it by 28 U.S.C., Section 1334, and Section 23 of the Bankruptcy Act, as amended, the District Court on September 27, 1967, entered an order affirming the order of the referee. (I-R. 81-82.) Within the time permitted by Section 25 of the Bankruptcy Act, as amended, the trustee filed a notice of appeal on October 24, 1967. (I-R. 83-84.)

Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291, and Section 24 of the Bankruptcy Act, as amended.

QUESTION PRESENTED

Whether under Section 57n of the Bankruptcy Act, as amended, proof of claim for taxes filed by the Internal Revenue Service on December 22, 1966, is a proper amendment to its original claim, which was timely filed or a new and separate claim which was untimely filed.

STATUTE INVOLVED

Bankruptcy Act, c. 541, 30 Stat. 544:

> Sec. 57. Proof and Allowance of Claims--[as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840].
>
> a [as amended by Sec. 1, Act of June 12, 1960, P.L. 86-519, 74 Stat. 217]. A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of the Bankruptcy Act, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim.
>
> * * * * *
>
> n [as amended by Sec. 14(b), Act of July 7, 1952, c. 579, 66 Stat. 420]. Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: Provided, however, That the court may, upon application before the expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or any subdivision thereof: Provided further, That the right of infants and insane persons

without guardians, without notice of the bankruptcy proceedings, may continue six months longer: And provided further, That a claim arising in favor of a person by reason of the recovery by the trustee from such person of money or property, or the avoidance by the trustee of a lien held by such person, may be filed within thirty days from the date of such recovery or avoidance, but if the recovery is by way of a proceeding in which a final judgment has been entered against such person, the claim shall not be allowed if the money is not paid or the property is not delivered to the trustee within thirty days from the date of the rendering of such final judgment, or within such further time as the court may allow. When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

(11 U.S.C. 1964 ed., Sec. 93.)

STATEMENT

The relevant facts, some of which were found by the referee (I-R. 63-67), may be summarized as follows:

The bankrupts, William Howard Mecom and his wife filed voluntary petitions in bankruptcy on September 10, 1964. The first meeting of creditors was held on October 12, 1964. The Internal Revenue Service filed a proof of claim on April 12, 1965, for $6,838.41 of taxes owed by the bankrupts. These taxes consisted of $360 of excise taxes for the fiscal year ended June 30, 1965, which had been assessed prior to bankruptcy, a $36.14 balance of income taxes for 1960, and income taxes for 1961 and 1962. (I-R. 2-28, 29, 56, 65.)

In the meantime, and shortly after the first meeting of creditors, the trustee in bankruptcy filed a petition against H & M Distributing Company, Inc., and H & M Freight Company, a fictitious name under which the corporation did business, in which the trustee claimed that H & M Distributing Company was the alter ego of the bankrupt. The referee found that H & M was the alter ego of the bankrupt and ordered the corporation's assets turned over to the trustee to be administered as part of the bankruptcy estate. (I-R. 31-55, 66.)

The Internal Revenue Service filed an amendment to its proof of claim on January 24, 1966. This amendment credited certain payments and other amounts, leaving a net balance owing of $6,292.82, comprised of income taxes for 1961 and 1962. (I-R. 57, 66.) The Service filed a supplemental proof of claim on December 22, 1966, in the amount of $46,578 for 1963 and 1964 income taxes. This claim was based primarily on the alter ego judgment and recovery by the trustee. The trustee did not have actual notice of the claim for 1963 and 1964 taxes until it was filed by the Service. (I-R. 58, 66-67.) Thereafter, the Service on March 9, 1967, filed a claim which consolidated its prior claims and also added an administrative expense claim for excise taxes.[1/] (I-R. 62, 67.)

1/ There is no issue in the present case concerning the claimed administrative expense taxes. (II-R. 16-19.)

In the meantime, several days before the Service filed its supplemental claim, the trustee on December 19, 1966, filed his first report and account and petition to pay administration expenses and a dividend to creditors. The referee filed on December 23, 1966, his findings of fact, conclusions of law, and order confirming the trustee's report and authorizing him to pay certain costs and expenses of administration and, to the extent possible, a dividend on filed and allowed priority claims and on general unsecured claims. (I-R. 59-60.)

The trustee objected to the Service's amended claim of December 22, 1966, on the ground that it was not timely filed. (I-R. 61.) The referee, relying upon this Court's decision in Menick v. Hoffman, 205 F. 2d 365, overruled the trustee's objection and held that the amendment was proper under Section 57n of the Bankruptcy Act, as amended, because the taxes included in the amended claim had the same generic origin and their recovery was based upon the same ground as the original claim. (I-R. 67-68, 75.) Upon a petition for review filed by the trustee (I-R. 72-73), the District Court affirmed the referee's order (I-R. 81-82). This appeal followed. (I-R. 83-84.)

SUMMARY OF ARGUMENT

This case is indistinguishable from, and is fully controlled by, this Court's decision in Menick v. Hoffman, 205 F. 2d 365.

Menick v. Hoffman holds that an amended additional claim of the United States for taxes owed by the bankrupt filed after the six-month period allowed by Section 57n of the Bankruptcy Act, as amended, is not a new claim but constitutes a proper amendment of a prior claim which had been timely filed. This decision is fully in accord with decisions holding that Section 57n does not prevent the filing of amendments to proofs of claims after expiration of the six-month period and which liberally allow amendments which are germane to the original claim and do not establish an entirely new and different claim.

Whatever factual differences may exist between the present case and Menick v. Hoffman, none calls for a different result here. In both cases the amended proofs of claim included income taxes for different years than those included in the claims which were timely filed. In each case the taxes claimed by the Government in an amended proof of claim were of the same generic origin and did no more than bring forward and make effective a federal tax indebtedness of the bankrupt which previously had been asserted in the original claim.

There is no warrant for comparing the extent to which a claimant may amend a proof of claim under Section 57n with the extent to which different kinds of claims may be amended under other statutes. Those other statutes serve very different purposes than the Bankruptcy Act, and it is the policies of the latter which must determine the scope of Section 57.

Alternatively, the bankruptcy court has jurisdiction under its equity powers to admit the Government's amended proof of claim to prevent an injustice.

ARGUMENT

THE REFEREE AND DISTRICT COURT CORRECTLY HELD THAT THE SUPPLEMENT TO THE PROOF OF CLAIM FILED BY THE UNITED STATES ON DECEMBER 22, 1966, WAS A PROPER AMENDMENT OF A TIMELY CLAIM AND, THEREFORE, WAS NOT BARRED BY SECTION 57n OF THE BANKRUPTCY ACT

A. Introduction

Section 57a of the Bankruptcy Act, as amended, supra, provides for the filing of a proof of claim, i.e., a statement by a creditor of the bankrupt, and Section 57n, supra, requires that such a proof of claim be filed within six months after the first date set for the first meeting of creditors, except that the United States or a state may obtain a reasonable extension of time for filing. The undisputed facts of the present case are that the United States filed an admittedly timely proof of claim for income taxes owed by the bankrupt for the years 1961 and 1962, and that after expiration of the six-month period it filed what it denominated a "Supplemental Proof of Claim" for income taxes owed by the bankrupt for the years 1963 and 1964.

The United States is not contending that it offered its amendment for the limited purpose of remedying an error or a defect in form in its initial proof of claim. Likewise, the United States

is not alleging that it requested or received permission from the referee to file its amendment, or that it is not subject to the requirements of Section 57n for filing a timely proof of claim. Instead, the first issue in this case is whether the amendment presented an entirely new and different claim which was untimely filed under Section 57n, as the trustee contends, or whether the claim set forth in the amendment was of the same generic origin as its original claim, and therefore was properly filed under Section 57, as the United States contends and the referee and District Court held. The second issue is whether the bankruptcy court has jurisdiction under the equity powers to admit the Government's amended proof of claim.

B. The Government's amended proof of claim was timely filed in accordance with Menick v. Hoffman

In Menick v. Hoffman, 205 F. 2d 365 (C.A. 9th), the first meeting of creditors was held on May 22, 1950, and the Government filed a proof of claim on November 21, 1950, one day prior to the expiration of the six-month filing period. This proof of claim was for F.I.C.A. taxes and income withholding taxes of the bankrupt's employees for the first quarter of 1950. On May 23, 1951, six months and one day after the running of the time for filing claims, the Government filed what it called an amended additional claim for income taxes owed by the bankrupt and his wife for the years 1944, 1945, and 1946. The trustee objected to the amended claim on the

ground that it was an entirely new and different claim. The referee sustained his objection, but the District Court reversed, and this Court affirmed the District Court's order as follows (p. 368):[2/]

> Not only does the caption or description of the questioned claim connote that it is a supplemental entity, the instrument being designated "Amended additional claim of United States for taxes," but the text of each of the two verified statements of indebtedness expressly shows a conjoint and correlative nature of the debt to be internal revenue taxes due to the United States. In the incipient tax claim signed and sworn to by the Collector of Internal Revenue on November 17, 1950, it is stated, "(2) that the nature of said debt is internal revenue taxes due pursuant to law as follows:" Then follows an item of "withholding" taxes, and in the questioned claim an identical expression of the nature of the debt is stated which is also followed by itemization of income taxes.
>
> Thus the questioned claim in suit contains only a statement of additional items amplifying a species of tax relationship and obligation that was asserted in the original claim and that continued to exist between the bankrupt and the sovereign taxing authority relative to internal revenue taxes. Cf. United States v. Roth, 2 Cir., 164 F. 2d 575; Continental Motors Corporation v. Morris, 10 Cir., 169 F. 2d 315; Industrial Commissioner of New York v. Schneider, 2 Cir., 162 F. 2d 847.

2/ The Government did not participate in the proceedings in the District Court or on appeal. At the time Menick was decided Section 17 of the Bankruptcy Act, as amended (11 U.S.C. 1952 ed., Sec. 35), did not discharge any federal taxes from bankruptcy. Thus it would appear that the Government could have collected the taxes included in its amended proof of claim from the discharged bankrupt out of his after-acquired assets.

> The duly filed initial claim of November 21, 1950, was for unpaid income taxes although the instrument itemizes the nature of the tax due as a "withholding" tax. But withholding taxes are income taxes which the employer must deduct from the wages of employees and for the payment of which tax the employer is liable to the Government. Both are demands of the same generic origin. And in such a situation the questioned claim filed with the referee May 23, 1951, does no more than bring forward and make effective a federal tax indebtedness of the bankrupt to the United States which was asserted in the initial claim. There is no change in the basic ground for recovery that is set out in the earlier claim on file with the referee.
>
> The omnibus attributes of the initial claim of the United States for taxes warrants the conclusion that the questioned instrument filed with the referee May 23, 1951, is not an entirely new, different, separate and distinct claim of the United States, the filing or consideration of which is interdicted or barred by Section 57 sub. n, of the Bankruptcy Act.

This Court's decision in Menick is fully in accord with the long-standing practice of liberally allowing amendments to proofs of claim. Thus, if the original proof of claim is timely filed, the only limitation relevant here is that the amendment does not introduce a distinctly new and different claim but bears some relation to the original claim. See In re Ebeling, 123 F. 2d 520, 521 (C.A. 7th); In re Parchem, 166 F. Supp. 724, 730 (Minn.). See also, 3 Collier on Bankruptcy (14th ed., 1967), Sec. 57.11, pp. 179, 182-200. In Menick, as we have shown, supra, this Court

held that the Government's amended claim was related to its original one because of the omnibus attributes of the Government claim for taxes, and there was no change in the basic ground for recovery.

There is no merit to the trustee's contention (Br. 6-10, 20-27), that the facts of the present case distinguish it from Menick. If anything, the Government's position is stronger here. For example, in Menick the original claim was for F.I.C.A. taxes and income withholding taxes for 1949 and 1950, and the amended claim was for income taxes owed by the bankrupt and his wife for earlier years, 1944, 1945 and 1946, whereas, in the present case, the initial claim was for income taxes for 1961 and 1962, and the amendment covered income taxes for 1963 and 1964.

The trustee errs in contending (Br. 25) that the Government's claim for 1963 and 1964 income taxes is entirely new because they had different assessment or reference numbers from the numbers assigned to the taxes claimed for the years 1961 and 1962. Such a contention is completely irrelevant. It overlooks the fact that each kind of tax is assessed separately, and that even the same tax is assessed separately for each separate period. Nevertheless, when the Government files a proof of claim it attempts to include in one claim all taxes, with their separate assessment and reference numbers, which are presently determined to be owing. Likewise, if the Government subsequently determines a deficiency for a particular

tax and for a specific period, the claimed deficiency bears a different assessment or reference number from the initial assessment.

Additionally, there is no basis for the trustee's contention (Br. 8-9, 26-27), that the Government relied upon different theories in its initial and amended claims. The trustee contends that (Br. 8) "The original claims were made on the theory that the bankrupt did not properly prepare his returns for the years 1961 and 1962", whereas (Br. 8-9) "The subject claim adopts an entirely new theory, namely that in view of a court's determination that the corporation was the alter ego of the taxpayer, Internal Revenue Service may disregard the corporate existence and treat all income and expense of the non-bankrupt corporation as the income and expense of the bankrupt individual". Such a contention overlooks Section 61(a) of the Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 61), which imposes an income tax upon all income from whatever source derived (except items specifically excluded by statute), as well as the fact that the ultimate ground relied upon by the Government in its proof of claim is that a bankrupt taxpayer failed to pay tax upon realized income. This is supported by an examination of the form used by the Government to file proofs of claim for internal revenue taxes, Form 2317. (I-R. 56, 57, 58, 62.) This form, which has been universally accepted by bankruptcy courts, sets forth only one ground in support of the Government's claim, that the bankrupt taxpayer is indebted to the United States

for taxes due under the internal revenue laws, and that no part of the claimed amount has been paid. Accordingly, the statement contained in the Government's amended proof of claim, that the bankrupt owed the additional amount claimed for internal revenue taxes, meets the requirement in Menick, that the basic ground be the same, and any reference to underlying legal or factual reasons in support of this ground is superfluous.

The decisions relied upon by the trustee (Br. 7-9) are not on point. For example, in Wheeling Valley Coal Corp. v. Mead, 171 F. 2d 916 (C.A. 4th), the creditor filed its original claim against the receiver for damages caused to the mines by the receiver's operations. Its amended claim was for damages caused by the bankrupt's breach of provisions in the lease requiring the mining of minimum monthly tonnage of coal and the surrender of the property to the lessor with the equipment in place and in a condition capable of producing a specified minimum monthly tonnage. Thus, the creditor's amended claim was directed against a different individual than was its original claim and the substance of its amended claim was radically different from that asserted initially.

In re Lewis J. Glazer, Inc., 95 F. Supp. 472 (Mass.), and In re Harmack Produce Co., 44 F. Supp. 1 (S.D. N.Y.), relied upon by the trustee (Br. 7-9), are also not on point. In these cases the United States and the City of New York, respectively, failed to file any timely proofs of claim. These decisions upheld the trustees'

objections to the untimely filed claims on the ground that there was nothing to which these proofs of claim could relate back and amend. The fact that the bankrupt had included the Government's tax claim in its schedule of debts filed with its petition in bankruptcy was held in Glazer insufficient to constitute the filing of a timely proof of claim by the Government.

C. The provisions for filing refund claims under the Internal Revenue Code of 1954 are inapplicable to proofs of claim filed under the Bankruptcy Act

The trustee relies strongly (Br. 11-20) upon various restrictions in the Internal Revenue Code of 1954 upon the filing by a taxpayer of untimely amendments to a claim for refund and contends that the same strictures should apply to the filing of amendments to a proof of claim in bankruptcy. This contention overlooks the fact that the practice of liberally allowing amendments to a proof of claim must be determined by reference to the history and policies of the Bankruptcy Act and not by provisions in other statutes with different histories and aims.

Section 6402 of the Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 6402) authorizes the Internal Revenue Service to credit or refund any internal revenue tax found to have been overpaid. Section 7422(a) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 7422) provides that the filing of a claim for refund shall be a jurisdictional prerequisite to a suit for recovery of the tax,

and Section 6511 (26 U.S.C. 1964 ed., Sec. 6511) establishes the period of limitation for filing refund claims. Whatever limitations exist under the statute, Treasury Regulations, or otherwise, requiring a claim to set forth in detail each ground upon which it relies or limiting a refund to grounds set forth in claims which were timely filed, these are inapplicable here.

The trustee fails to recognize that refund proceedings under the 1954 Code involve claims brought by a taxpayer against the Government and constitute an exception to the immunity of a sovereign from suit. There is no doubt that a sovereign can impose various jurisdictional and similar requirements as a prerequisite to allowing a court proceeding against it. The filing of a proof of claim in bankruptcy by the Government to collect taxes owed by a bankrupt taxpayer, on the other hand, does not involve any question of sovereign immunity. Instead, this has been the traditional method of satisfying claims of unsecured creditors. Thus, there is no correlation between any limitations upon amending a refund claim filed with the Government and the lack of similar restrictions upon amending a proof of claim in bankruptcy.

There are other differences between a claim for refund filed by a taxpayer under the 1954 Code and a proof of claim for taxes filed by the Government in bankruptcy. Our tax system is largely one of self-assessment by taxpayers of amounts owed by them.

A taxpayer who files a refund for taxes usually possesses the pertinent information, but the converse is not always true. Frequently the Government lacks needed information. If the provisions of the 1954 Code relating to the administrative procedures for handling refunds and requiring their observance before instituting an action in court are to be meaningful, the Government must be supplied with sufficient information to enable it to act intelligently on the refund claim. If this information is not forthcoming, or a taxpayer may amend his claim and immediately thereafter sue for a refund, the Government may be prevented from acting on the claim and may be precipitated into a needless lawsuit.

The situation is very different where the Government files a proof of claim for taxes owed by the bankrupt. Generally the Government obtains needed information from the taxpayer's books and records, which have been taken over and are available to the trustee. There is little likelihood that a trustee will be surprised by the Government's proof of claim or amendment or will be unable to determine whether or not to interpose an objection. This is particularly true in the present case, where the Government's amendment was based upon a judgment requested and obtained by the trustee (I-R. 31-35), and he reasonably should have considered the possible tax consequences of the judgment. 3/

3/ The decisions relied upon by the trustee (Br. 11-20) apply to amendments to refund claims and, hence, are not on point.

The trustee also mistakenly relies (Br. 15-18) upon a supposed analogy between an amendment to a proof of claim and an amendment to a pleading under Rule 15(a) of the Federal Rules of Civil Procedure. In addition to overlooking the basic differences between the two situations, the trustee errs in contending that Rule 15(a) strictly limits the right of a party to a lawsuit to amend a pleading. Amendments to a pleading have been liberally allowed, provided they do not result in undue prejudice to the adverse party. Subject to this proviso, amendments have been allowed at any stage of the case, and it has been held immaterial whether the amendment changes the cause of action or theory of the case or states a claim arising out of a transaction different from that originally sued upon. See Foman v. Davis, 371 U.S. 178, 182. See also, 2 Barron and Holtzoff, Federal Practice and Procedure (Rules ed.), Secs. 442, 445, 447, and 448; 3 Moore's Federal Practice (2d ed.), Secs. 15.02 and 15.08.[4/]

4/ General Order 37 of the General Orders in Bankruptcy (11 U.S.C., Appendix, 1964 ed.) provides that the Federal Rules of Civil Procedure shall apply to proceedings under the Bankruptcy Act insofar as they are not inconsistent with the Act. Rule 15(a) permits a party to amend his pleading once as a matter of course at any time before a response has been served and thereafter upon leave of court. Although this provision is more relevant to the filing of pleadings under Section 18 of the Bankruptcy Act, as amended (11 U.S.C. 1964 ed., Sec. 41), Collier has also

[Continued]

The trustee also contends (Br. 18-20) that if a proof of claim is filed pursuant to Section 57, and is not objected to by the trustee, the claim is allowed. He then contends, by analogy to tax refund decisions, that once a claim has been allowed and the time for filing another claim has expired, the original claim may not be amended. Previously, we have pointed out that tax refund procedures under the 1954 Code are not relevant to bankruptcy. In addition, it may be noted that Section 57k of the Bankruptcy Act, as amended, permits a claim to be reconsidered upon application by the trustee or any creditor or the bankrupt, as follows:

> Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

There is no comparable provision in the 1954 Code which authorizes a reconsideration of a tax refund claim which previously had been allowed. Moreover, even if it were relevant, which we deny, the

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4/ [Continued]
applied Rule 15(a) to proofs of claim filed by creditors, and states that a creditor may file an amendment to his proof of claim without leave of the referee if the trustee previously had not objected to the claim. See 3 Collier on Bankruptcy, supra, Sec. 57.11, p. 179. In the present case the trustee did not file any objection until after the Government's amendment of December 22, 1966, had been filed. (I-R. 58, 61.) Moreover, neither the trustee's first report nor the referee's order on the report which authorized the payment of a dividend (I-R. 59-60) (which was filed one day after the Government's amended claim) objected to the amended claim.

trustee is mistaken in contending that the Government's original claim and its January 21, 1966, amendment had been allowed because the trustee was in process of paying it. The referee's order authorizing a payment of dividends was not filed until December 23, 1966, one day after the filing of the Government's amended claim on December 22, 1966. Moreover, there is nothing in the record to show that the trustee had filed a final account, and that the referee had approved such an account and had discharged the trustee. Hence, the bankruptcy estate was not closed when the Government filed its December, 1966, amended claim.

D. The equities support the Government's right to amend its proof of claim

There is an additional reason, completely apart from the application of Section 57n, why the Government may amend its proof of claim in this case. The trustee filed a petition on June 14, 1965 (I-R. 31-42), and the referee issued findings of fact, conclusions of law and a judgment on November 1, 1965, which held that the corporations were the alter ego of the bankrupt and which authorized the trustee to take the assets of the corporations into his possession and administer them as assets of the bankrupt's estate (I-R. 43-55).

There is no justification for the trustee's contention (Br. 27) that if taxes are owing for 1963 and 1964 because of improper returns filed by the corporation, the Government should

be restricted to pursue its remedies only against it. Such a contention completely overlooks the legal consequences of the referee's judgment. If the trustee brings a proceeding pursuant to his powers under Section 70 of the Bankruptcy Act, as amended (11 U.S.C. 1964 ed., Sec. 110), to recover certain assets into the bankruptcy estate on the ground that the corporations were alter egos of the bankrupt, such a judgment would collaterally estop the Government from treating the corporations as separate entities for the same years. See Coleman v. Alcock, 272 F. 2d 618 (C.A. 5th). Moreover, the trustee's contention completely ignores the practical effect of the referee's judgment, which was to deplete completely the corporation's assets, and to preclude any recovery by the Government against them. Finally, the trustee's contention also misapprehends the nature of the Government's amended claim. This claim is not for corporation taxes owed by these companies; instead, the Government has determined a deficiency in personal income taxes owed by the bankrupt.

The trustee also contends (Br. 26), that the Government should not be entitled to file an amended claim for taxes which did not exist until more than six months after the first meeting of creditors. The short answer to this contention is that the Goverment's claim is the logical consequence of a proceeding instituted by the trustee only after the expiration of the

six-month period, so that these amounts are a proper subject matter of an amended proof of claim.

Finally, the trustee contends (Br. 27) that the Government's amended claim should not be allowed because it was filed more than thirteen months after the referee filed the alter ego judgment. This contention is refuted by testimony of the revenue agent that prior to December 21, 1966, he did not know, and the trustee had not advised him, that the latter had recovered any assets of the corporations into the bankruptcy estate, as follows (II-R. 30-31):

> Q Mr. Meyers, when were you advised that the Trustee had recovered assets belonging to H. & M. Distributing Company?
>
> A December of 1966.
>
> Q And who advised you of this?
>
> A Mr. Bumb.
>
> Q And was this by telephone?
>
> A Yes, sir.
>
> Q Would you state to the court what your filing procedures were in following up this advice?
>
> A Well, Mr. Bumb had told me that he had received the money from this bank account in Carson City and was about to make distribution of the assets. I then called Judge Walker and told him that it was my understanding that distribution was to be made and that there were additional tax liabilities, and I asked him from the court standpoint what procedures I could follow, and he referred me to our Special Procedures section.

Q and would you --

THE REFEREE: The last comment brought it back to my recollection.

Q BY MR. STERN: Would you state what the filing procedures were after the advice from Judge Walker?

A I then contacted our Special Procedures section and they told me that if I had my report written and up to them immediately that they would file an amended proof of claim. So at that point I wrote my report and brought it in, and Special Procedures tookit [sic] from there.

Q Mr. Meyers, now, does the date December 21, 1966 sound familiar with respect to the information received from Mr. Bumb?

A Yes, sir, I think that was the day I talked to Mr. Bumb on the telephone.

Q Now, prior to that date had you had any information at all concerning the assets of H. & M. Distributing Company?

A I knew that Mr. Bumb had taken assets and disposed of them, liquefied them. I also knew of the ancillary proceedings taking place, but I didn't know that it had been brought to a successful conclusion and the money was in the hands of Mr. Bumb until I talked to him on that date.

Q You did not know that there were any assets at all until that date; is that correct?

A Yes, sir.

Under the circumstances it would be inequitable to deny the Government an opportunity to file an amended claim for income earned in 1963 and 1964. This is fully in accord with Bank of Marin v. England, 385 U.S. 99, in which the Court recently stated that (p. 103) "There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction", and cited its earlier opinion in Pepper v. Litton, 308 U.S. 295, wherein it had stated as follows (pp. 304-305, fn. 11):

> And even though the Act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the Bankruptcy Court in the exercise of its equitable jurisdiction had power to permit claims to be proved thereafter in order to prevent a fraud or an injustice.

CONCLUSION

For the reasons stated, the order of the District Court is correct and should be affirmed by this Court.

Respectfully submitted,

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APRIL, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: this 15th day of April, 1968.

Asst. United States Attorney.